SEP 2 2004

GSA Office of the Chief Acquisition Officer

MEMORANDUM FOR RONALD POUSSARD
DIRECTOR
DEFENSE ACQUISITION REGULATIONS COUNCIL

FROM: RODNEY P. LANTIER, DIRECTOR
REGULATORY AND FEDERAL ASSISTANCE
PUBLICATIONS DIVISION

SUBJECT: FAR Case 2003-008, Share-In-Savings Contracting

Attached are comments received on the subject FAR case published at 69 FR 40514; July 2, 2004. The comment closing date is September 6, 2004.

Response Number	Date Received	Comment Date	Commenter
2003-008-1	07/07/04	07/07/04	Maya Telecom
2003-008-2	08/17/04	08/17/04	Distributed Solutions, Inc.
2003-008-3	08/19/04	08/19/04	U.S. EPA
2003-008-4	08/19/04	08/19/04	Scott Livingston
2003-008-5	08/19/04	08/12/04	ABA
2003-004-6	08/31/04	08/31/04	American Federation of Government Employees
2003-008-7	08/31/04	08/31/04	ITAA
2003-008-8	08/31/04	08/31/04	DOC
2003-008-9	08/31/04	08/31/04	POGO

U.S. General Services Administration
1800 F Street, NW
Washington, DC 20405-0002
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2003-008-10	09/09/04	08/27/04	Jorge Scientific Corp.
2003-008-11	09/17/04	08/31/04	Kelly, Anderson & Assoc.

Attachments

2003-008-1

"Frank Germonto"
<frankg@mayatel.com
>

07/07/2004 10:03 AM

To: farcase.2003-008@gsa.gov
cc:
Subject: Far Case 2003-008

While Far Case 2003-008 paragraph B. States in part , The councils do not expect the proposed rule to have a significant economic impact on a substantial number of small entities, because use of Share-in-Savings contracting will be targeted only to a limited number of information technology projects, and the impact on small businesses is not anticipated to be significant. The following questions arise.

- What are the parameters $ or otherwise to be considered in placing an information technology project in the Share-in-Savings arena?
- What determines a limited number and/or what % of information technology projects will be selected for SIS designation?
- Will the Small Business specialists be able to have input on what is placed in the SIS program?
- To what degree and how can Small Business Subcontractors benefit from the Share-in-Savings initiative for Information Technology?

Thank you,

Frank Germonto
Director of Government Sales
Tel: 407-804-5577 Ext. 234

[IMAGE]

MAYA TELECOM

Rcvd 7-7-04

2003-008-2

"Tuttle, Peter"
<PeterT@distributedinc.com>
08/17/2004 05:08 PM

To: farcase.2003-008@gsa.gov
cc: "Falcone, Ron" <RonF@distributedinc.com>
Subject: FAR Case 2003-008 Share-In-Savings Contracting - Proposed Rule

Dear Ms. Duarte:

Distributed Solutions Inc. (DSI) is a small business founded in 1992 in Northern Virginiaspecializing in the manufacture of a robust procurement software solution set called the Automated Acquisition Management System (AAMS). AAMS is currently deployed in more than twenty federal agencies. We appreciate the opportunity to provide the below comments on the proposed rule:

1. General Comment and Example of a SIS Success:

A fairly recent Share-in-Savings (SIS) Contracting experience of an exempted federal agency (non-FAR) may be of benefit for all federal agencies considering SIS contracting.

One area that SIS contracting has been successfully applied is in the area of telecommunications, where, in this specific case, the contractor was required to reduce local agency telecommunications costs, create operational efficiencies at a number of major facilities across the USA, and deliver minimum guaranteed savings, over a two year period.

The contractor, who was empowered by the by a "letter of agency" evaluated the agency's local telecommunications usage and spend patterns, and then negotiated more cost efficient services with the various telecommunications carriers. The contractor put other operational efficiencies into place as well.

The contractor paid the agency a minimum guaranteed cost savings/recovery of $15 million over a two year period. The agency paid no fee to the vendor. The vendor collected their fees out of any cost savings/recovery amounts achieved, above and beyond the minimum guarantee, based on a gain-share ratio established in the contract (60% of any savings to the agency; 40% of any savings to the vendor). A sophisticated reporting process was emplaced in order to verify the amount of savings claimed against the baseline that was established in the contract.

An interdisciplinary Supply Chain Management Team was initially formed by the agency and conducted an extensive market investigation, coupled with a detailed internal agency telecommunications study to determine the feasibility of utilizing SIS and choosing the best candidates for SIS. Several rounds of industry input was sought prior to competitive solicitation and award. A substantial amount of internal agency research and data was made available to the vendors: 1) facility information, 2) POC list, 3) major facility list, 4) known telephone numbers, 5) spend data

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and 6) traffic study information. The pre-award investigation and formulation process took approximately one year.

There are many more details surrounding this acquisition, but these high points should be of interest.

As a condition for using this information in our response to the request for public comment, we were asked to keep the information general. If, however, the FAR Secretariat would like additional details on this particular procurement or the name of a agency POC, we can provide that information upon request.

2. Specific Comments:

a. 39.301 Definitions. "Share-in-Savings contract means ….. (2) The Government pays ….." Not necessarily. If a minimum guarantee and gain-share ratio model is utilized, the government may not be required to make payments to the contractor. The contractor's payments can be considered the fees they recoup via the negotiated gain-share arrangement.

39.304 General. The contractor may or may not bear an "unusual" risk. Much of the risk factor depends on the amount, quality and timeliness of the information the government releases to the offerors prior to and during the proposal process.

3. Points of contact: Ron Falcone, CPCM and Peter Tuttle, CPCM. Both can be reached at (703) 471-7530

Regards,

Peter Tuttle, CPCM
Distributed Solutions, Inc.

(703) 471-7530

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

AUG 11 2004

OFFICE OF
ADMINISTRATION
AND RESOURCES
MANAGEMENT

Ms. Laurie Duarte
General Services Administration
Regulatory Secretariat (MVA)
1800 F Street, NW, Room 4035
Washington, DC 20405

Dear Ms. Duarte:

Thank you for the opportunity to comment on the proposed rule regarding Share-in-Savings Contracting, under the Federal Acquisition Regulation (FAR) Case 2003-008. The Environmental Protection Agency has one comment for your consideration.

Please clarify the FAR language at FAR 39.307-2(b)(2) which provides that the aggregate number of Share-in-Savings contracts may not exceed five for "all other agencies" (besides DOD, NASA, and the Coast Guard) in each of fiscal years 2004 and 2005. Although notification of the Office of Management and Budget is required, it is unclear who determines which of the proposed procurements will be solicited or how an agency will know a proposed procurement is within the quantity of the five contracts permitted per year.

If you have questions in reference to our comment, please contact Linda Clement on (202) 564-4356.

Sincerely,

Ronald L. Kovach, Director
Policy, Training, and Oversight Division
Office of Acquisition Management

Rec'd 8-19-04

2003-008-4

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bcc:

Subject: FAR Rule Comments

Dear Colleagues,

The State of Maryland, where I specialize in procurement law, is beginning to pursue share-in-shavings contracting opportunities. For the federal sector, it seems great progress is being made. Here are my comments on the proposed FAR Rule on Share-in Savings.

Subject:FAR Rule Comments

The proposed FAR Rule (2003-008) on Share-in-Savings Contracting representa significant advancement from the Advanced Notice of Proposed Rulemaking (ANPR) published in October 2003. Please accept the following specific comments regarding the proposed rule:

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1) The inclusion of process oriented steps is an important facet of any SiSprocurement. The proposed rule offers a reasonable methodology for the acquisition community to follow.

2) The e-tools referenced in proposed FAR Part 39.306-2 area major step forward. The ability to define baseline costs and calculate a risk score will allow program managers to determine the suitabiltyof potential SiSprojects. Traditionally, defining baseline costs is one of the major barriers to successful execution of SiStype contracts.

3) It appears that the business case tool's methodology follows OMB's A-11 Circular for Budget Execution and Submission. The Proposal Evaluation Tool is well designed and will give contracting officers a fair basis from which to evaluate proposals.

4) It is recommended that proposed FAR Part 39.306-6 "Managing Retained Savings" be expanded to offer more detail. Given that Congress chose to implement SiSthrough the FAR, it seems logical to use it (the FAR) to publicize more detailed budget guidance. Specifically, there should be more practical guidance that assures budget officers that augmenting existing appropriations is not illegal if the procurement is conducted using the specific E-Gov statutory authority.

5) The comment in the preamble about reconciling the Statute's sunset legislation needs to be reconciled as soon as possible. Our read of the legislation is that inherent authority to do SiScontracts exists in the multi-year authority set forth in the Federal Acquisition Streamlining Act of 1994. That is, the government may enter into a contractual arrangement without obligating upfront funds as long as there is a promise to pay a contractor a portion of any future savings. What expires in the E-Gov Act is the provision that allows agencies to receive a share of the savings. This issue should be clarified before the Final Rule is published.

2003-008-4

Thanks for the opportunity to comment.

Scott Livingston

Sent on behalf of Scott A. Livingston by:

****

Donna K. McHugh

Administrative Assistant

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2003-008-5

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Pursuing Justice

AMERICAN BAR ASSOCIATION

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August 12, 2004

Via E-Mail and First-Class Mail

General Services Administration
Regulatory Secretariat (MVA)
1800 F Street, NW, Room 4035
ATTN: Laurie Duarte
Washington, D.C. 20405

Re: Proposed Rule on Share-in-Savings Contracting, FAR Case 2003-008, 69 Fed. Reg. 40514 (July 2, 2004)

Dear Ms. Duarte:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced matter.[1] The Section consists of attorneys and associated professionals in private practice, industry, and Government service. The Section's governing Council and substantive committees have members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association's Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.

[1] The Honorable Mary Ellen Coster Williams, Daniel I. Gordon, and Robert A. Burton, Council members of the Public Contract Law Section, did not participate in the Section's consideration of these comments, and they abstained from voting to approve this letter.

Recd 8/19/04

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As described in the proposed rule:

> Section 210 of the E-Government Act amends the Armed Services Procurement Act and the Federal Property and Administrative Services Act to address the use of SIS contracts for IT. Share-in-Savings is an innovative, performance-based concept that is intended to help an agency leverage its limited resources to improve or accelerate mission-related or administrative processes to meet strategic goals and objectives and lower costs for the taxpayer. Under an SIS contract, the contractor finances the work and then shares with the agency in the savings generated from contract performance. In general, agencies would agree to pay the contractor for services performed only if savings are realized and, in such cases, only a portion of the total savings realized.

69 Fed. Reg. 40514 (July 2, 2004).

The proposed rule referenced above appears to be a faithful implementation of the statutory requirement (Section 210 of the E-Government Act of 2002). We recognize that this is a new concept, and that the rule can, and should, be modified or expanded after Contracting Officers gain some experience in its application. The Section, however, believes that some minor changes and additional guidance before the final rule is promulgated would facilitate the use of share-in-savings contracting.

I. Definitional Comments

For some time, share-in-savings has been used successfully in federal and other governmental energy-savings contracts, but this is a new concept to the Federal Government in the IT area. Thus, terminology may be unfamiliar and definitions are correspondingly important. It appears to the Section that the proposed rule needs some clarification and additional definitions. "Benefit Pool," "Current Baseline," "Projected Baseline," and "Savings" are critical terms and are defined but "quantifiable baseline" used in Proposed 48 C.F.R. § 39.309 is not. "Quantifiable baseline" comes from the E-Government Act, which states:

> Contracts awarded pursuant to the authority of this section shall include a provision containing a quantifiable baseline that is to be the basis upon which a savings share ratio is established that

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> governs the amount of payment a contractor is to receive under the contract. Before commencement of performance of such a contract, the senior procurement executive of the agency shall determine in writing that the terms of the provision are quantifiable and will likely yield value to the Government.

10 U.S.C. §2332(a)(4).

It appears that the statutory term is equivalent to the "Current Baseline" but that is an interpretation that should be made clear -- ideally the same term should be used as we propose below.

We are also concerned about some lack of clarity in the definitions of the proposed rule and the possibility of confusion arising from the interplay of these terms. The "current baseline" is defined as "the estimated total cost to the Government *to implement an information technology project through other than a Share-in-Savings contract*. It includes all costs of ownership, including procurement, management, operation, maintenance, and administration." Proposed 48 C.F.R. § 39.301 (emphasis added). This definition thus appears to be based on the assumption that there will be some IT contracts implemented without the share-in-savings provision. A better scenario is one in which the agency does not have the upfront budget to implement an IT project, and without the share-in-savings provision, would continue to operate inefficiently out of year-to-year funding. This is the scenario in many of the energy savings contracts where an agency lacked funding to replace windows, thermostats, and HVA systems, but expected annual funding to continue at levels sufficient to pay for the inefficient operating costs. Thus, once the contractor paid for the system's improvements, the savings were paid out of the old operating funding levels. If the agency had assumed it would undertake the improvements, no savings would be realized and it would not have gotten the improvements because it lacked those capital type funds. In a perfect world, the agency could justify and obtain such capital funding.

The proposed regulation could lead to confusion of the cost and benefit concepts also because it does not clearly distinguish between their use in evaluating competing proposals and their use in paying out the winning contractor's share of the realized savings. Conceptually, in the evaluation process, the agency uses an estimate of future costs based on its experience with the current systems to establish a baseline and then, if necessary, adjusts the contractor's estimates of savings generated by implementation of its proposal. After award, the contractor is paid based on actual costs saved (and if agreed and implemented, quantified

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quality improvements) compared to the agreed baseline. We would anticipate that at the time of award, the baseline for payment might be adjusted somewhat to better align it with the contractor's proposal than the baseline used in evaluating the competing proposals. As written, the definitions do not address this distinction unless that is what is meant to be conveyed by the parenthetical "new" in the definition of Benefit Pool:

> *Benefit Pool*--Savings realized based on the net difference between the current baseline costs and the projected (new) baseline costs derived from the implementation of the new project or program.

Proposed 48 C.F.R. § 39.301. In the context of SIS contractor payments, the benefit pool, *current* baseline, and *projected* baseline definitions assign definitions that are counterintuitive - the *current* baseline is the *estimates* of out-year costs that would have been incurred but for the SIS contract made at the time of the contract award, while the *projected* baseline is *actual* costs incurred to meet the same needs during contract performance. One could also argue that these costs do not constitute the baseline.

We therefore suggest the following changes to the defined terms:

1. Change "Projected Baseline" to "Projected SIS Costs," defined as the "estimated total cost to the Government to meet the same needs covered in the current evaluation baseline through a Share-in-Savings information technology project - exclusive of savings to be paid the contractor."

2. Change "Current Baseline" to "Current Evaluation Baseline," defined as "the estimated total cost to the Government to continue meeting the needs described in the performance based work statement as currently forecast without a Share-in-Savings contract. It shall include all costs of ownership, including procurement, management, operation, maintenance, and administration."

3. Add a new term, "Evaluation Benefit Pool," defined as "the difference between the Current Evaluation Baseline and the Projected SIS Costs plus anticipated, quantified quality improvements, if any, for each offeror."

4. Add a new term, "Savings Pool," defined as "the difference between the Contractual Baseline, that is the Current Evaluation Baseline as adjusted in the awarded contract to reflect the SIS project being undertaken, and actual costs incurred by the

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> Government to meet the needs covered by the contractual baseline plus agreed payments for meeting or exceeding defined objectives to reflect the quantified quality improvements used in evaluating the winning proposal. This is the "quantifiable baseline" required by the E-Government Act of 2002.

Based on these definitional changes, we would suggest "savings pool" be substituted for "quantifiable baseline" in 48 C.F.R. § 39.309(a)(1). We would likewise suggest that 48 C.F.R. § 39.309(a)(2) read as follows:

> (2) Before award of a Share-in-Savings contract, the agency senior procurement executive shall determine in writing that the savings pool established in the contract quantifies with reasonable accuracy the value the share-in-savings award will likely yield to the Government.

II. General Comments

We also suggest the following additional areas for your consideration:

1. The definition of "cancellation" in proposed section 39.301 states that cancellation results when the contracting officer fails to notify the contractor that the funds are available for performance of the succeeding program year requirement. We see no reason to leave the contractor in doubt and have cancellation occur by default. The contracting officer should be required to give written notification to the contractor in all cases.

2. The definition of "Share-in-Savings contract" in this same section emphasizes quantifiable savings by not including explicitly the notion of quantifiable benefits from the savings definition. We envision that at least some if not many of the improvements in information technology may be qualitative and could greatly improve mission performance, but still not be readily quantifiable in dollar savings, or at least not precisely. Some flexibility to establish objective criteria to reward the contractor in such situations might be considered.

3. Solicitation of Proposals. The guidance in proposed Subpart 39.306-4 is fairly sketchy. Would offerors be responding to a broad statement of need, a requirement for a specific IT capability, or anything between these extremes? The solutions and thus the risks

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could be different for every offeror in responding to a performance-based solicitation, further complicating the identification of evaluation criteria and selection of "best value." The proposed rule may not be the place to include an example to illustrate how this process will work, but some consideration should be given to making such additional guidance available on the GSA Share-in-Savings website or elsewhere.

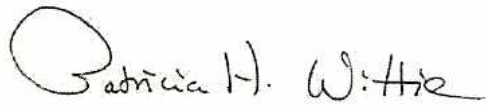
4. There is no mention of risk of loss prior to completion of contract performance. Share-in-Savings contracts often contemplate that the Government will obtain IT assets at the end of performance; indeed, obtaining the assets is often one of the reasons for using a Share-in-Savings approach. Often, however, these assets will be located in a Government facility. Thus, there may be situations in which it would be appropriate for the Government to share or assume the risk of certain types of loss prior to contract completion (e.g., if a Government building that houses the Contractor's assets should be destroyed). Because the manner in which risk allocation should be addressed may not be obvious (and is apparently not addressed by standard FAR clauses), the contract should address explicitly which party bears the risk of loss during contract performance. This allocation may, in fact, differ depending upon which proposal is accepted because asset use and importance to the Government may differ depending on the approach chosen.

5. There is no mention of intellectual property rights, either with respect to hardware or software that offerors may develop. Is it assumed that what the successful contractor delivers is a proprietary commercial item and the Government only acquires the offeror's standard commercial rights or limited rights? The rule should note that because the contractor is financing the work, the typical presumption should be that the contractor owns all the intellectual property. Regardless of whether the final regulation reflects this suggestion, it should require the contract to expressly and clearly address the IP issue to avoid many questions later and to ensure both parties understand the implications of the SIS contract for these important rights. *See Data Enterprises of the Northwest v. General Services Administration*, GSBCA No. 15607, 2004 WL 323922 (Feb. 4, 2004); *Ervin and Associates, Inc. v. United States*, 59 Fed. Cl. 267, (2004); 18 *Nash & Cibinic Report* ¶¶ 19, 20 & 21 (May 2004).

2003-008-5

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,



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Chair, Section of Public Contract Law

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Hubert J. Bell, Jr.
Mary Ellen Coster Williams
Council Members
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David Kasanow

008-6

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

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August 31, 2004 2003-008-6

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Washington, DC 20405

Attn: Ms. Laurie Duarte
Re: FAR case 2003-2008

Dear Sir or Madam

These comments are submitted on behalf of the American Federation of Government Employees, AFL-CIO (AFGE). AFGE represents over 600,000 federal employees and has a strong interest in the efficient and effective management of federal agencies, a fair and transparent federal budget process, and the prudent expenditure of taxpayer funds. So-called "share in savings" (SIS) contracts violate all of these interests. Further, the proposed rules to implement SIS authority fail to impose adequate safeguards to mitigate the negative aspects of SIS contracts.

The proposed rule claims that the intention is to "minimize the financial risk to the government" from SIS contracts, and to amend the FAR in such a way that "would motivate contractors and successfully capture the benefits of SIS contracting." The proposed rule does not minimize financial risk to the government. The rule does, however, provide ample opportunity for contractors to win higher profits from federal agencies than they ever could achieve doing business within the private sector, as no profit-seeking competitive firm would ever survive the costly and irrational terms of an SIS contract.

The problems with SIS contracts derive from both the private financing of federal purchases and the notion of paying contractors for some or all of the savings an agency realizes from a taxpayer investment in new information technology. Unfortunately, the proposed rule does not address either of these problems from a taxpayer perspective. Instead, it focuses on how to justify the use of SIS contracts, how to justify extensions to ten-year performance periods, how to justify costly "best value" award decisions, how to justify retaining "savings" rather than returning them to the Treasury, how to measure the cost of cancellation or termination, and how to describe the value of a contract with so much contingent cost, and finally how to use measurement of "savings" or "other benefits" from an SIS contract to increase the cost of the contract to taxpayers.

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SIS contracts are based upon the premise that a contractor deserves payment not only for costs incurred and services and goods delivered, but also for any benefit the purchaser might have realized as a result of having purchased the contractor's product. If an agency enters into an SIS contract for information technology, it must relinquish some or all of the benefit of the acquisition. Why would a federal agency agree to this? The answer implicit in the proposed rule appears to be that agencies believe that the only way to obtain desired information technology is to use "back door" financing techniques, and pay the attendant fees that "back door" financing always entails. In the process, Congress and the American taxpayer are not only deceived about the true and long-term costs of the contracts; they are deprived of the opportunity to choose a more advantageous purchase.

The rule fails to address the cost of using private financing rather than public financing for the acquisition of new information technology. The fact is that public financing of federal purchases is always less costly than private financing, even if the public financing involves the issuance of public debt rather than an appropriation from current revenue. Executive branch agencies should always be constrained in their purchases by a requirement to acquire goods and services in a manner that is least costly for taxpayers. SIS fails this most basic test of the minimum cost doctrine.

The proposed regulations should have attempted to protect taxpayers through the imposition of restrictions on rates of profit for private financing of information technology purchases through SIS contracts. The cost of this shortcoming will vary with the size of the contract, with interest rates, and with the difference between the Treasury rate and rates of interest available to private borrowers. Because SIS authorities have been expanded at the same moment that the nation's half trillion dollar deficit is poised to cause steady increases in both private and public borrowing costs, SIS contracts can be expected to be costlier and costlier each year. Private firms will insist upon being compensated for rising interest rates, and agencies will pay unnecessarily for this "risk" (unnecessarily because as federal agencies, they could have secured financing at the always more advantageous Treasury rate). In addition, lengthening SIS contracts up to ten years only maximizes the period of time during which contractors will be able to charge the government a premium for the increases in interest rates and any risk the private firm has that its own borrowing costs may rise.

In the proposed rule that addresses the measurement of "savings" and "baseline" and "projected baseline" costs, the government has also missed an important opportunity to require the measurement of real differences in cost, and aim its cost comparison analysis toward providing real savings to taxpayers. Why only compare the cost of status quo ante with the cost of the SIS contract? Why only compare these costs after an SIS contract has been awarded? Why not compare the cost of the status quo ante with the cost of acquiring the information technology being sold by the SIS contractor through direct appropriations? Why not compare the cost of the status quo ante with the cost of acquiring the desired new information technology through direct appropriations and hiring federal employees to perform the government's work with the SIS contract in a public-private competition? Why not compare the cost of the SIS contract for

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information technology to the cost of a firm fixed-price contract for the same information technology? If the goal were to get the best information technology at the best price for taxpayers, these would be the comparisons that agencies would make.

Instead, agencies are being asked to participate in a highly tendentious exercise that assumes the existence and size of something that cannot be measured objectively, e.g. "improvements in mission-related or administrative processes" or "acceleration of achievement of agency missions." Even if any of these were quantifiable, why should an agency pay its information technology contractor for them?

SIS advocates base their argument that contractors have a legitimate claim to some or all of the "savings" or "other benefits" of new information technology on the contention that without a SIS contract, the government would have no other means of obtaining the new information technology and thus no other means of realizing these "savings" or "other benefits." This contention is false. Although it is true that agencies sometimes encounter difficulty convincing either the Office of Management and Budget (OMB) or Congressional appropriators to authorize their desired purchases, SIS merely constitutes a means of going "behind the back" of OMB and Congress to obtain what they might not have obtained through normal means. In return for facilitating this end run around Congress, SIS contractors demand not only a profit on the sale of their products, and not only a profit on their own financing costs, but some or all of the differences in the agency's per unit output costs before and after the acquisition of the new technology.

The proposed rules clarify that "savings" retained by the agency be credited to appropriations or funds set aside to finance either the contract or other information technology purposes. This is a tacit acknowledgement that these savings belong to the U.S. Treasury, and should not be directed to the contractor without an appropriation by Congress.

SIS contracts are also deceptive because they are based on a never-proven assumption that the acquisition of new information technology improves productivity and thereby lowers per unit costs for an agency. While it is undoubtedly true that some acquisitions of information technology are productivity-enhancing, it is just as true that some acquisitions represent a desire to have what is new. Unfortunately, acquiring new information technology makes even productivity-enhancing acquisitions of new information technology so costly that they cannot be justified as savings vehicles.

A simple example can illustrate. Question: When is it inefficient for an agency that has a machine that produces 50 units of output per hour at a penny a unit and to buy a new machine that produces 100 units an hour? Answer: When the new machine is obtained through an SIS. Why? Because with an SIS, acquiring the machine that produces 100 units an hour brings the cost of production to three cents a unit. The agency not only has to pay for the machine, but it also has to pay a premium price for financing the purchase of the machine, and has to relinquish to the seller all of the "savings" produced by the machine! The machine doubled productivity, but the agency not only had to pay for the

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machine, it had to give up the benefits of the machine's productivity improvement to the one who also very profitably sold the machine.

In the above example, savings are easy to calculate, but this is not true in the context of federal agencies' purchase of information technology service contracts. The measurement of "savings" or "other benefits" relies heavily on the computation of "current baseline" costs versus "projected baseline" costs. The difference between these costs form the "benefit pool" from which SIS contractors take their third dip from the Treasury, the first two being the profitable sale of the technology and profitable sale of access to borrowed funds from private sources. The regulations posit no method for calculation of these "savings." Indeed, the language defining "savings" is so murky and ill-defined as to represent virtually unlimited liability on the part of the federal government.

Who will put a price on "savings" defined as "improvements in mission-related or administrative processes that result from implementation of the solution" or the "acceleration of achievement of agency missions?" The danger is clear that an agency, at the mercy of its information technology contractor, will be exploited and the taxpayer will be left to pay the bill. It is not at all far-fetched to imagine a contractor claiming that $100 million accurately describes the "acceleration" of Americans' feeling of safety attributable to an information technology contract with the Department of Homeland Security.

The proposed ten-year period for SIS contracts also serves to maximize their riskiness and costliness to taxpayers. The proposed rules refer to investment risk undertaken by contractors that might dissuade them from undertaking an SIS contract if it were for a period as short as five years. However, there is no risk to a contractor in an SIS contract. All the risk is on the agency and to taxpayers. If for some reason Congress acts to eliminate funding for the program that utilizes the information technology obtained through an SIS contract, the contractor would be entitled to certain damages specified in the Termination and/or Changes clause in the contract. In most cases, the contractor would be made whole. Despite having purchased the information technology, the federal government would not even have the flexibility to shift the resources to another use or to another agency because again, a unilateral change imposed by the government triggers a contractor's right to be made whole according to the contract's terms and conditions. Limiting SIS contracts to one to two years, however, does have the benefit of limiting taxpayer liability. Ten years worth of imagined or manufactured "savings" or "other benefits" is far costlier to taxpayers than two years.

Lengthening SIS contracts to as long as ten years also dramatically increases the full cost of a contract with hard to measure "savings" or "acceleration of achievement." When do the savings end? Is it justifiable to continue the fiction that "savings" are the difference between costs in year one and year ten? Can the agency plausibly continue to assume that without the SIS contract, it would have made no productivity improving investments over the course of an entire decade?

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There are two additional problems in the proposed rule that are particularly harmful to federal employees. The first derives from the fact that there is nothing to prevent agencies from using SIS contracts in the context of public-private competitions under OMB Circular A-76. In these instances, former Office of Federal Procurement Policy Administrator Angela Styles has written that "federal employees will be effectively prohibited from competing for the jobs." Between the practical prohibition proposing large capital expenditures as part of an in-house Most Efficient Organization (MEO) offer, and the fact that decreasing the number of Full Time Equivalents will not be allowed to count as an agency "savings," federal employees will be taken out of the competition, and both they and taxpayers will be the worse for it.

The second is the proposal to prohibit agencies from retaining savings "attributable to a decrease in the number of civilian employees of the federal government performing the function." While this can be interpreted as a disincentive to agencies to shed federal employees, the fact is that there is nothing in the proposed rule to prevent contractors from claiming payment for an agency's "savings" from the elimination of federal employee positions. Why should an agency relinquish money it saves from the elimination of federal jobs to a contractor? What possible public interest is served by this distinction?

When an SIS contractor takes over government work formerly performed by federal employees, the SIS contract will include the cost of compensating the contractor's employees. Apart from the fact that the rule never even contemplates holding public-private competitions for this government work despite its tacit acknowledgement that replacing old information technology with new does not constitute "new" work and thus justify an avoidance of OMB Circular A-76 procedures, how can the government justify using taxpayer funds to pay for *both* the contractor's workforce and its own former workforces, calling the latter a "share" of "savings?" Would it not be better public policy –and cost neutral -- to retain the federal employees and continue to pay them rather than hand over their former compensation costs to an SIS contractor and call it a "share" of "savings?"

The proposed rule states that while "agencies may retain savings" that amount to more than what they give the SIS contractor, they may not retain "any portion of such savings (sic) that is attributable to a decrease in the number of civilian employees of the Federal Government performing that function." This is the only mention in the proposed rule of any restriction on the size of "savings" that can be charged to taxpayers under an ongoing SIS contract. In other words, while there is a limit on what an agency can "retain" or "share," there is no limit on what the SIS contractor can "retain" or "share."

Indeed, the focus in the proposed rule on limiting the government's liability in cases of termination or cancellation is misplaced. The real liability for the government in the context of SIS contracts is not when they are cancelled (in that case there is a formula for calculating the contractor's costs and the contract's value). The real liability is in the measurement and payment of so-called "savings." However, the proposed rule is as

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silent on this liability as it is on the liability for usurious interest rate premiums from the private financing of federal purchases.

There is one other curious and seemingly logically inconsistent point in the proposed rule. In section 30.306-5, the proposal dictates that awards shall be made on a "best value basis" and goes on to describe "other factors" beyond those that are "price related" to state that awards will be considered on the basis of "factors such as highest overall net present value return to both the Government and the contractor." Best value awards are controversial because they allow the government to award contracts on the basis of subjective criteria rather than the objective criterion of cost, which is best for taxpayers.

The proposed rule is especially troublesome because it would enshrine in the FAR the notion that both the seller and the purchaser can simultaneously achieve "highest overall net present value return." If an agency "shares" "savings" with a contractor in an SIS contract, it will certainly not achieve its "highest overall net present value return" from its investment, although the contractor surely will. Indeed, achieving "highest overall net present value return" is a zero-sum proposition –both parties to a transaction cannot achieve it. AFGE proposes dropping "and to the contractor" from the language in order to maximize benefits to the taxpayer from SIS contracts.

Finally, the proposed regulation ask agencies to "notify" OMB of their intention to award SIS contracts with unfunded cancellation or termination liabilities 30 days prior to the issuance of a solicitation. This is not an adequate protection for taxpayers. There should be no unfunded liability.

For all of the above-mentioned reasons, AFGE opposes the use of SIS contracts. Legislation to allow capital budgeting federal agencies' investments would constitute a far better alternative from the perspective of federal employees, federal agencies, and taxpayers. The authorization of SIS contracts for information technology may represent a certain desperation on the part of federal agencies, but the price is simply too high, especially when more efficient and less costly solutions such as capital budgeting are available.

That private contractors have come up with SIS contracts as a "solution" to agencies' fears that Congress will view with skepticism arguments regarding the value to taxpayers of large, long-term expenditures on information technology is deeply troubling. Equally troubling is the fact that, as written, this proposed rule ignores the public interest and benefits only the private contractors who seek to exploit that fear. We hope you will reconsider these proposed regulations, support the establishment of reforms to the budget process to allow for capital budgeting, and in the meantime, put forward new rules to protect federal employees, federal agencies, and taxpayers from the enormous costs of SIS contracts.

Sincerely yours,

Jacqueline Simon
Public Policy Director

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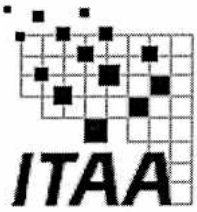

August 31, 2004

Via E-mail (farcase.2003-008@gsa.gov)
General Services Administration
Regulatory Secretariat (MVA)
1800 F Street, NW
Room 4035
ATTN: Ms. Laurie Duarte
Washington, DC 20405

Re: FAR Case 2003-008; Proposed Rule for Share-in-Savings Contracting, 69 Fed. Reg. 40514 (July 2, 2004)

Dear Ms. Duarte:

The Information Technology Association of America (ITAA) submits these comments to the Proposed Rule recently published by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) regarding Government-wide use of Share-in-Savings (SIS) terms for information technology (IT) contracts. As indicated in ITAA's comments to the October 2003 Advanced Notice of Proposed Rulemaking, our members strongly support use of such terms as an effective form of performance-based contracting. ITAA urges the Councils to quickly finalize the rule consistent with the comments contained herein.

We present our comments in two sections: 1) General Comments; and 2) Specific Comments regarding two of the Councils' requests for specific input.

General Comments

1. It is very important that there be a mechanism similar to the Changes clause that enables the parties to renegotiate the SIS terms if the parties' upfront assumptions fail to be met due to intervening or unanticipated events. For example, there often are many contractors performing work for the Government affecting an agency's IT infrastructure. If *another* contractor's work unexpectedly and negatively impacts the SIS work, there should be an explicit mechanism for the SIS

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contractor and the agency to change the baseline or other SIS terms to reflect the changed environment.

2. The Councils should revise FAR Part 39 to enable the contractor to cancel the contract if continued performance is not commercially reasonable despite the contractor's best efforts. Such a cancellation clause is fair considering that the contractor privately funds the performance and is subject to substantial financial risk.

3. FAR 39.307 should be revised to explicitly reflect a termination for convenience provision that enables the contractor to recover terminations costs that include the unrecovered "up front" investment.

4. SIS contracts are the ultimate performance-based contracts, providing maximum incentive for the contractor to provide best value to the Government. ITAA urges the Councils to state as much in the preamble to the Final Rule and encourage agency use of this important contract vehicle.

Comments on Questions Raised by FAR Council

1. The Proposed Rule's Background section indicates that the Councils are still evaluating whether the FAR should explicitly recognize that SIS contracting is *not* dependent on the express authority provided by Section 210 of the E-Government Act, and if such authority shall continue to exist after Section 210 sunsets. ITAA strongly believes that the authority to enter into SIS contracts already exists under current law and is therefore not dependent on Section 210. For example, agencies may utilize the Federal Acquisition Streamlining Act's (FASA's) multi-year contracting authority to enter into long-term contracts. Because FASA's multi-year contracting authority does not have a sunset date, SIS contracts under FASA or other authorities (e.g., energy savings performance contracts) may continue notwithstanding Section 210's expiration. ITAA urges the Councils to make this distinction clear in the Final Rule.

2. The Councils have proposed two additional questions concerning *cancellation and termination*:

- How, if at all, should the determination of cancellation liability differ from the determination of termination liability, when the termination is for other than default? ITAA believes that the definition of Cancellation in proposed FAR 39.301 accurately captures the difference between cancellation and

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termination, other than for default. However, inserting a definition for termination may help distinguish the two contracting officer actions.

- How, if at all, should the determination of cancellation and termination costs differ from that used in connection with multi-year contracts (see FAR 17.106-1(c))? As mentioned above, ITAA supports the addition to FAR 39.307 of a clause that would enable the contractor to recover terminations costs that include the full unrecovered "up front" investment.

For these reasons, ITAA supports the Proposed Rule and urges its immediate implementation.

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ITAA provides global public policy, business networking, and national leadership to promote the continued rapid growth of the IT industry. ITAA consists of over 400 corporate members throughout the U.S. and a global network of 50 countries' IT associations. The Association plays the leading role in issues of IT industry concern including information security, taxes and finance policy, digital intellectual property protection, telecommunications competition, workforce and education, immigration, online privacy and consumer protection, government IT procurement, human resources and e-commerce policy. ITAA members range from the smallest IT start-ups to industry leaders in the Internet, software, IT services, ASP, digital content, systems integration, telecommunications, and enterprise solution fields. For more information visit www.itaa.org.

ITAA greatly appreciates this opportunity to provide our comments.

Respectfully submitted,

Harris N. Miller
President
Information Technology Association of America

2003-008-8

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08/31/2004 04:26 PM

To: farcase.2003-008@gsa.gov
cc: mSade@doc.gov
Subject: DOC's Comments on FAR Case 2003-008 (Share-in-Savings Proposed Rule)

The Office of Acquisition Management, for the Department of Commerce, is pleased to submit the following comments and questions in response to the proposed FAR Rule, Share-in-Savings Contracting (FAR Case 2003-008).

1. The concept of shared savings is reasonably clear but how it would work in "real life" is not. Under an SIS contract, the contractor finances the work and then shares with the agency the savings generated from contract performance. Agencies pay the contractor for services only if savings are realized. In many cases, we can envision that there would be a long time lag before real savings are realized. How long would a contractor have to continue to finance the effort before they receive benefit of the savings? And once the savings are realized, what is the time frame for the government to review and "pay" the savings? For, e.g., at the end of the base period, or option year, task completion, or some other time increment?

2. Under the rule, the agency may not retain any portion of savings that is attributable to a decrease in the number of civilian employees of the Federal Government performing the function. Many times, and especially in the IT environment, a large percentage of savings to be realized is in the reduction of manpower and/or labor hours required to perform a function. If the SIS IT solution does collaterally result in reduced FTE for the Government in the specific function, what happens to that portion of the savings? Is it transferred to a different function within the organization, passed on to the contractor or just "lost" ?

3. For the purposes of determining the clauses to be included in the contract, the CO is to use the maximum cancellation amount as the contract value. This amount is probably not a true reflection of the total value of the work to be done over the life of the contract. Also, since "the amount payable in the event of cancellation or termination...shall be negotiated ...at the time of contract award"....the CO will not know what the maximum cancellation amount will be when preparing the solicitation (the time when applicable provisions are to be selected). We suggest the acquisition plan, Exhibit 300B, and other pre-award documentation, including the IGE, would be a better basis for establishing contract value for the purpose of selecting solicitation provisions.

4. Again, if the amount of any cancellation or termination costs are determined at award, are they re-negotiable through the life of the contract? COs are normally encouraged to use a technology refreshment clause to ensure IT products provided keep current with technological advancements, which seems to indicate the cost to the contractor, if the contract is cancelled/terminated, is going to keep increasing.

5. For an SIS contract to work as intended, there have to be specific measures, both in terms of performance and cost, and an effective monitoring system, above and beyond what might be in place for some of the existing performance based acquisitions. Would the increase in cost to the Government for the higher level of surveillance be deducted from the potential savings that a contractor might share?

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6. Is the authority (E-Government Act of 2002 Public Law 107-347) that allows the head of an agency to enter into a Share-in-Savings contract for information technology being extended? Currently it expires September 30, 2005, which will limit the ability of agencies to effectively implement this program.

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August 31, 2004

Submitted via e-mail: farcase.2003-008@gsa.gov

General Services Administration
Regulatory Secretariat (MVA)
1800 F Street, N.W. Room 4035
ATTN: Laurie Duarte
Washington, D.C. 20405

RE: FAR Case 2003-08

Dear Ms. Duarte:

The Project On Government Oversight ("POGO") provides the following public comment to proposed rule "Federal Acquisition Regulation; Share-in-Savings Contracting" published in 69 *Federal Register* 40514 (July 2, 2004). The proposed rule would amend the Federal Acquisition Regulation ("FAR") to implement Section 210 of the E-Government Act of 2002 (Public Law 107- 347), which authorizes government-wide use of share-in-savings ("SIS") contracts for information technology ("IT").

Under SIS contracts, the government pays a contractor a small portion of money owed for work and the contractor provides the remaining up-front capital financing (i.e., an interest-bearing loan). Over the term of the contract, the risk assumed by the contractor is repaid in the form of a large percentage of savings or revenues that resulted from their IT work.[1] In other words, the government awards an unappropriated contract in which it commits to pay the contractor a portion of what would otherwise be appropriated for the procured activity.

The proposed rule would expand a troubled pilot program. POGO opposes the proposed rule, concluding:

- SIS contracts may violate the U.S. Constitution, federal regulations, and limit congressional oversight;
- SIS contracts require uncertain projections;
- SIS contracts will increase direct spending by $450 million; and
- SIS contracts will create a non-competitive contracting environment.

POGO investigates, exposes, and seeks to remedy systemic abuses of power, mismanagement, and subservience by the federal government to powerful special interests. Founded in 1981, we are a politically-independent, nonprofit watchdog that strives to promote a government that is

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accountable to the citizenry.

DISCUSSION

I. CONSTITUTIONALITY AND OVERSIGHT OF SIS CONTRACTS

Under government's normal checks and balance system, agencies create budgets and make requests to Congress for funding. After debate, Congress determines where and how much money it will appropriate to those agencies. The E-Government Act (the "Act") circumvents the appropriation process, authorizing agency heads to enter into SIS contracts with unappropriated funds. POGO avers that SIS contracts usurp congressional authority and, despite 31 U.S.C. § 1341(a)(1)(B) (which allows agencies to spend unappropriated funds if they are "authorized by law"), may be unconstitutional.

The Appropriations Clause, U. S. Constitution, Article I, Section 9, Clause 7 states: "No money shall be drawn from the treasury, but in consequence of appropriations made by law." Simply stated, Congress decides where taxpayer money goes. The Appropriations Clause is a check and balance, ensuring that government agencies are dependent on the will of American taxpayers as expressed through elected Members of Congress. The U.S. Supreme Court has stated that the Appropriations Clause's fundamental purpose is "to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents[.]" *Office of Personnel Management v. Richmond*, 496 U.S. 414, 428, 110 S. Ct. 2465, 110 L. Ed. 2d 387 (1990). The Court has also said that the Appropriations Clause "was intended as a restriction upon the disbursing authority of the Executive department.... It means simply that **no money can be paid out of the Treasury unless it has been appropriated by an act of Congress**." *Cincinnati Soap Co. v. United States*, 301 U.S. 308, ___, 57 S. Ct. 764, 81 L. Ed. 1122 (1937) (emphasis added).

The SIS contracting vehicle cedes one of Congress' most fundamental duties to the Executive branch, allowing agency heads to spend unappropriated tax dollars. The deviation from the checks and balance system also raises concerns with contract oversight. Because Congress did not appropriate the funds, it may be limited from its normal oversight function, which would prove fatal in protecting taxpayer interests.

In addition, the SIS program allows agencies to retain funds saved and not paid to contractors. "Because agencies get to retain funds saved and not paid to contractors, the proposal creates an environment for off budget financing of operations." Testimony of Robert J. Lieberman, Deputy Inspector General Department Defense to the Subcommittee on Technology and Procurement Policy House Committee on Government Reform, *State for the Record on The Services Acquisition Reform Act (SARA) of 2002*, March 12, 2002, p. 4. As a result, the proposed rule creates an agency "savings" slush fund that Congress has handed over to the Executive Branch.

II. DIFFICULTY IN PREDICTING FUTURE SAVINGS AND HOW IT WILL COST THE TAXPAYER

SIS contracts also create the inherent problem of determining current and future costs to establish a baseline for future savings. As evidenced by astrology and daily horoscopes, predictions rarely come true. The reliability of predicting savings with any certainty is a major concern with SIS contracts.

The proposed rule amends 48 C.F.R. § 16.401 by including SIS contracts as incentive contracts. Incentive contracts, however, should only be used when "firm-fixed-price contracts are not appropriate" and when the agency can establish "**reasonable and attainable** targets that are clearly communicated to the contractor." 48 C.F.R. § 16.401(a)(1) (emphasis added). The proposed rule adds section 48 C.F.R. § 39.309(2), stating that "[b]efore award of a Share-in-Savings contract, the agency senior procurement executive shall determine in writing that the terms of the baseline clause are quantifiable and will likely yield value to the Government." Government employees have opined that SIS contracts rarely, if ever, can establish "reasonable" targets or baselines from which saving can be realized.

Robert Lieberman, Deputy Inspector General Department Defense, has testified:

> We also have concerns because the DoD does not yet have the ability to determine the actual current costs of operations with any certainty. The contracting officer needs a good cost baseline for calculating improvements against which benefits can be calculated. Determining the cost of operations is why public/private competitions often require 2 or more years. Until the pilot programs currently authorized are completed, and lessons learned developed, we do not support the [SIS] proposal.

William T. Woods, Acting Director, Acquisition and Sourcing Management GAO, testified before Congress that "[g]athering reliable baseline data can be difficult. Testimony of William T. Woods before the Subcommittee on Technology and Procurement Policy, Committee on Government Reform, House of Representatives, *Contract Management: Taking a Strategic Approach to Improving Service Acquisitions*, GAO-02-499T, March 7, 2002, p 7.

The Government Accountability Office ("GAO") confirmed in a report the difficulty of predicting accurate IT baselines in 2003, stating:

> By its nature, SIS cannot work without having a baseline and good performance measures to gauge exactly what savings or revenues are being achieved. Agreement must be reached on how metrics are linked to contractor intervention. For some services, such as energy management, they are relatively easy to define. For more complex services, such as those in the information technology industry, this can be a much more difficult task.

GAO, *Contract Management: Commercial Use of Share-in-Savings Contracting*, GAO-03-327, Jan. 31, 2003, p. 8-9. If accurate baselines cannot be established, the government cannot be adequately assured that taxpayer dollars are not being paid to contractors in the form of "savings" rather than being returned to the government.

Furthermore, contractor cost and pricing data for commercial transactions is not available to the federal government for audit purposes. Therefore, the proposed rule does not allow the agency awarding the SIS contract to confirm or audit the contractor's projected "savings." SIS contracts that do not include an audit provision is another example of the fox guarding the henhouse.

Additionally, any multi-year contract awarded on a non-fixed-price basis should include what is called a "Limitation of Funds" or "Limitation of Costs" clause that restricts the public's exposure to the amount that is appropriated. Without a limitations clause, a contractor may walk away with $20 million for $10 million of goods and services because an agency decided not to request a direct appropriation. No matter the contractor's up-front capital outlay, taxpayers dollars should not be so freely forfeited. Angela Styles the former Administrator for federal Procurement Policy in the Office of Management an Budget, has publicly stated that her "office never found or received evidence of any savings realized through [SIS] financing schemes."

The difficulty with establishing a "reasonable" baseline was best illustrated in the Department of Education's Inspector General's report on updating the Federal Student Aid ("FSA") program. The report said:

> During the course of our review, we reported that [Federal Student Aid] needed to use more accurate baseline information and maintain documentation that showed that it considered alternatives to the share-in-savings type contract. Accurate baseline information is crucial to the success of share-in-savings contracting. We also reported that FSA did not provide documentation supporting a consideration of alternatives to the share-in-savings task order for the Central Data System (CDS) simplification.
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> * * *
>
> We found that, even though FSA's payments to the Modernization Partner were made in accordance with the terms of the contract, the $20.3 million baseline used to measure the contractor's performance and to calculate contractor payments for the share-in-savings task order was overstated by about $5.4 million.

U.S. Department of Education, Office of Inspector General, *Audit of FSA's Modernization Partner Agreement, Final Audit Report*, ED-OIG/A07-B0008, Nov. 2002, p. 10-11. The student aid program's response was that the baseline was only overstated by $1.3 million rather than the $5.4 million. The IG considered the agency's "response and additional cost information and [saw] no reason to change [its] recommendations." *Id.* at 11. This dispute illustrates the inherent problem with SIS contracts – baselines are difficult to estimate.

An additional problem with SIS contracts is that long term contracts of five to ten years, which provide job security for contractors, lock the government into obsolescence providing no incentive for contractors to upgrade technology. The DoD IG explained:

> The 10-year length of the contract is unnecessary and may actually impede further savings. The periodic expiration of a service contract should provide an occasion to spur competition and permit the Government to obtain a better deal or better technology than offered by the incumbent. For example, by year 10 [of a SIS

contract] the technology offered by the incumbent can be 7 years out-of-date but still cheaper than the original Government operation. A 10-year contract may provide little incentive for proposing significant improvements after the initial proposal to win the contract.

III. INCREASE IN DIRECT SPENDING

SIS contracts are also distressing considering the federal government's financial climate. "CBO estimates that expanding the use of SIS contracts would increase direct spending by $80 million over the 2004-2008 period and by a total of about $450 million over the 2004-2013 period." Congressional Budget Office, *Cost Estimate for H.R. 1837, Services Acquisition Reform Act of 2003*, July 29, 2003, p. 1. With many other federal programs being cut and the escalating bills for the war on terrorism, an increase in direct spending will have to be offset by an equivalent amount of direct spending reductions, revenue increases, or a combination of both, which the government has not considered.

IV. AN ENVIRONMENT OF LESS THAN FULL AND OPEN COMPETITION

A final concern with SIS contracts pertains to the non-competitive environment that they will create. This contracting vehicle creates a risk for contractors thereby prohibiting small and medium-sized businesses from competing for the contract. Many, if not all, small and medium-sized contractors do not have the up-front capital necessary to enter the SIS contracting world. Instead, SIS contracts will reward large contractors that can wait five to ten years to receive the return on their investment. By eliminating small businesses and mid-sized contractors (which receive a large percentage of government contracts), the federal government is unlikely to receive the best price that the commercial market can offer, thereby costing the American taxpayer.

V. CONCLUSION

In addition to being unconstitutional, share-in-saving contracts are analogous to the shopper who arrives home with a bag of clothes, excitedly explaining that they saved so much money because everything was "50% off." That shopper fails to consider their purchases from the perspective of the money spent. SIS contracts create that same false impression.

Rather than entering into a firm fixed price contract with incentives for efficient and effective work, the government is attempting to circumvent Congress' appropriations authority and hide behind contractor proclaimed "savings" to the government. SIS contracts are advertised as being risky for contractors and a windfall for agencies, which cannot obtain financing from Congress for new and improved informational technologies. SIS contracts, however, hide the cost to the federal government behind smoke and mirrors, offering end-loaded payoffs for goods or services that potentially could cost the government more than their value had Congress provided a direct appropriation.

Thank you for the opportunity to provide public comment on this important contracting issue.

2003-008-9

Sincerely,

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[1] The proposed rule subsection 39.301 defines "savings" as "[m]onetary savings to an agency" or the "[s]avings in time or other quantifiable benefits realized by the agency, including enhanced revenues (other than enhanced revenues from the collection of fees, taxes, debts, claims, or other amounts owed the Federal Government)."

2003-008-10

JORGE SCIENTIFIC CORPORATION

August 27, 2004

General Services Administration
Regulatory Secretariat (MVA)
1800 F Street, NW
Room 4035
ATTN: Ms. Laurie Duarte
Washington, DC 20405

Subject: FAR Case 2003-008 Proposed Rule – Share-in-Savings Contracting

Dear Ms. Duarte:

Please accept our comments on the above subject referenced case. Jorge Scientific Corporation (JSC) is a woman owned small disadvantaged business whose primary customer based is the government. One of our strongest core competencies is Information Technology (IT) and we have strived to increase our expertise, services, and support in this very competitive technological environment. Accordingly, whenever, we are made aware of proposed regulations that may impact our ability to compete in the marketplace, we have a strong interest in assessing the proposed rules. Within tis context, the proposed Share-In-Savings (SIS) contracting falls within our sphere of interest.

We recognize that there are currently sunset provisions relative to this approach and that it has a limited number of contracts at the present time. We are assuming that the nature of the IT efforts envisioned under this approach, should it be adopted as a "general use vehicle" method of contracting, is not intended to replace all IT support in the federal market place. Should this assumption not be correct, we would have serious reservations; however, proceeding from the perspective of SIS being used in well defined efforts, we none the less submit that the potential for adverse impact on small business is present. To this end, we would raise the following issues as being areas of small business concern that we recommend GSA address before any large scale or government wide implementation of SIS:

It appears that given the limited number of SIS contracts authorized, i.e., a total of 10, and the implied scope of the envisioned IT projects, that the intent is that these SIS contracts be directed towards large business. Notwithstanding that, there are several issues that would be relevant:

- If the SIS approach is more widely adopted, then it would be a way to effectively eliminate small businesses from IT project contracts simply by stating that they are an SIS contract. Placing the development cost burden on small business with the hope that it will share in "some portion" of the savings results in an unacceptable risk on the small business. Effectively SIS contracting requires

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small business to fund government IT development. Small businesses do not usually have the resources to "underwrite" this type of development.

- If SIS contracting is limited to large business, then small business is relegated to only playing a subcontractor role. Unless the small business has unique proprietary applications or processes, the reality is that large business will not "task" small business with the higher level work. By the same token, it is not clear at all as to how Prime/Subcontractor arrangements would factor in the SIS contract. How would the "share in the portion of the savings" be calculated and flow down to the small business subcontractor? What remedy would the small business have in this scenario?

We appreciate your consideration of these points. Should you wish to discuss these comments, please contact me at your convenience.

Sincerely,

Thomas J. Slaughter
Director of Marketing
703.379.1469

2003-008-11

KELLY, ANDERSON & ASSOCIATES, INC

August 31, 2004

Ms. Laurie Duarte
FAR Secretariat
General Services Administration
1800 F Street, NW, Room 4035
Washington, DC 20405

Re: FAR Case 2003-008

Dear Ms. Duarte:

I am pleased to have the opportunity to respond to the July 2, 2004 *Federal Register* notice of proposed rulemaking for the Federal Acquisition Regulation's provisions applicable to Share-in-Savings (SIS) contracting.

One element of the proposed FAR that we believe is quite significant to the interests of industry is that a contractor appears to have no recourse for recouping even a portion of its direct costs, if anticipated savings are not achieved for reasons beyond the control of the contractor.

We recognize that the intent of the Government in SIS contracting is to provide a very strong incentive and a meaningful stimulus for a contractor to develop and to successfully implement new Information Technology solutions that will save significant levels of Federal funds for a customer agency.

However, an SIS contract with a term of 5 years could be significantly impacted by factors unanticipated by both the contractor and the Government contracting agency. The impact of such factors on the contractor's processes of applying IT resources to certain Government operations could negatively affect the level of anticipated savings, through no fault of the contractor. Illustrative examples of such unanticipated factors might include new Federal statutes, new Executive branch regulations, a change in the Administration and the President's operating policies and priorities, reassignment of agency senior officials and, therefore, changes in program approaches, new Government-wide program initiatives set by oversight agencies that impact all agencies' operations, including the specific one that is targeted for cost savings in the SIS contract, etc.

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Therefore, we recommend that the Civilian Agency Acquisition Council and the Defense Acquisition Council consider including in the FAR a provision that permits the contracting officer to develop, during the contract negotiation stage, a formula for an equitable adjustment and payment to the contractor of some or all of the contractor's out-of-pocket costs. This would be applied when, through no fault of the contractor, the anticipated savings are not realized due to such circumstances as illustrated above. Ideally, the FAR language should provide broad discretion to contracting officers to exercise their business judgment in developing such a settlement formula. The formula may or may not permit full recovery of a contractor's investment, with or without profit, depending upon the circumstances of the case.

Thank you for the opportunity to present our concerns and suggestion. If there are any questions regarding our submission, please contact me at (703) 518-8828 by telephone or at tom.omalley@kapa.net by e-mail.

Sincerely,

Thomas P. O'Malley

Thomas P. O'Malley, CPCM
Senior Associate